U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

Issue Date: 16 July 2007

Case No.: 2004-LHC-1749

OWCP No.: 07-161277

In the Matter of:

P. M.,
Claimant

vs.

NORTHROP GRUMMAN SHIP SYSTEMS, INC.,
(Formerly Ingalls Shipbuilding, Inc.)
Employer

DECISION AND ORDER ON REMAND

PROCEDURAL STATUS

This case arises from a claim for benefits under the Longshore Harbor Workers' Compensation Act (the Act),[1] brought by Claimant against Northrop Grumman Ship Systems Inc. (Employer). The case was referred for a formal hearing on 16 Dec 04. On 16 Feb 05, I issued a decision and order that was appealed. On 20 Mar 06, the Benefits Review Board issued an order remanding the case. Employer moved for reconsideration, but was denied on 5 Nov 06. On 24 Apr 07, the case was returned by the Board to Office of Administrative Law Judges, and on 4 May 07, a post remand briefing schedule was set.

BACKGROUND

Original Decision and Order

The relevant issue at the a hearing was whether vacation days and holidays on which an employee does not work but for which he is paid should be included as work days in the average weekly wage (AWW) calculation. The lines were clearly drawn by counsel, who specifically agreed on the record that:

[1] 33 U.S.C. §§901-950.

1. Claimant had earned $33,725.79 in the year preceding his injury.[2]

2. Claimant actually worked on 234 days in the year preceding his injury.[3]

3. Employer paid Claimant wages for 29 vacation days and holidays, even though he did not actually perform work on those days.[4]

4. Section 10(a) of the Act was applicable and provided the correct method of calculating Claimant's average weekly wage.[5]

5. The only issue for litigation and adjudication was whether the 29 days should be added to the 234 in determining the figure by which to divide Claimant's annual wages and calculate an average daily wage.
    a. Employer argued that the law required such an addition, and the divisor should be 263.
    b. Claimant argued that no addition should be made and the divisor should be 234.

Claimant testified that he normally worked eight hour days, Monday through Friday and never sold back any vacation days. The six holidays for Employer's employees were New Year's Day, Fourth of July, Easter Monday, Thanksgiving, Christmas, and Good Friday.

Based on that record and the applicable law,[6] a decision and order was issued finding for Employer that the appropriate number of days to use in calculating then average daily wage was 263.

Order on Remand[7]

On appeal, the Board had no record to consider but noted that it needed none, since the parties did not dispute any of the essential facts. The Board observed that under

---

[2] Tr. 7.
[3] Tr. 14.
[4] Tr. 41. "ALJ: So we're talking about twenty-nine vacation and holidays.
Claimant's Counsel: Yes.
Employer's Counsel: Correct."
[5] Tr. 7.
[6] *Ingalls Shipbuilding, Inc. v. Wooley*, 204 F.3d 616 618 (5th Cir. 2000).
[7] On appeal, the Board noted that due to Hurricane Katrina it was unable to obtain the record. (The record was forwarded from OALJ to the District Director on 16 Feb 05, more than six months before Hurricane Katrina.) Nonetheless, the Board observed that the parties did not dispute any of the essential facts and it did not require a record, basing its opinion on only the decision below and counsel's appellate briefs. Counsel apparently assumed the Board had a complete record until they received the Board's initial opinion. In its opinion, the Board remanded the case because it did not have a record and was unable to verify certain facts. Employer submitted what it claimed was a copy of CX-1 in a motion for reconsideration, but Claimant alleged the document had been altered and the Board refused to consider it. In any event, upon my request Counsel have provided me with a copy of the trial transcript and CX-1.

Wooley, vacation days and holidays paid in lieu of regular work days are properly included in the average daily wage divisor. It expressed concern, however that in this case the "resulting calculation of 263 days worked is flawed because it exceeds the number of days available to a five-day worker…."

The Board noted that in *Wooley*, vacation ""days" had in actuality been created by dividing hours of paid vacation time by eight," resulting "in claimant's having "worked" 267 days, which exceeds the 260 days that a five-day a week worker can work in reality as well as the statutory multiplier, and thus reduc[ing] claimant's average weekly wage below his actual earnings." The Board also observed that *Wooley* stands for the proposition that "Section 10(a) aims at a theoretical approximation of what a claimant could ideally have been expected to earn in the year prior to his injury" and that ALJs should make "fact findings concerning whether a particular instance of vacation compensation counts as a 'day worked' or whether it was 'sold back' to the employer for additional pay."

The Board found that in this case, Claimant's paid vacation days and holidays taken in lieu of a work day were properly included in making the average daily wage calculation, but that the "conclusion that claimant thus had 263 work days in the year prior to his injury cannot be affirmed without additional findings, as the number of days exceeds the 260 days per year available to a five-day worker." The "fact that the number of days calculated exceeds 260 raises the possibility that days have been created by dividing hours paid by eight, a result contrary to *Wooley*, or that claimant received vacation or holiday pay for time that was not in lieu of a regular work day." The Board noted that using 263 as the divisor and then multiplying the average daily wage by the statutory 260 yields annual earnings less than that actually earned in the twelve months prior to the injury. It remanded the case for further findings consistent with *Wooley*.

POSITIONS OF THE PARTIES

In its initial brief on remand, Employer argued that the record clearly indicated that Claimant never "sold back" any vacation days or holidays and in arriving at a total calendar days were counted; hours were not divided by eight. Employer also noted the record showed that Claimant worked an occasional Saturday and Sunday, which accounts for the total days in excess of the standard 260 days for a five day worker. Employer concluded that a proper application of Section 10(a) and *Wooley* results in an average daily wage calculation divisor of 263.

Claimant's answer brief amended his stipulation at trial and stated that Claimant actually worked not 234, but 235 days.[8] Claimant also noted a day on which Claimant worked for four hours and took four hours leave, but had a full day for each included in

[8] Claimant does not explain how or why the new figure of 235 differs from the 234 to which he stipulated at trial. He simply cites the court to CX-1 and submits an additional chart referring to CX-1.

the stipulations.[9] He argued that since the application of *Wooley* in this case resulted in an annual earnings figure which was less than that Claimant actually earned; Section 10(a) cannot fairly and reasonably be applied. However, he did not abandon his stipulation that Section 10(a) applies. He instead abandoned his stipulation that Claimant had 29 vacation days and holidays and argued that there were only 16 such days that should have been counted. Claimant submits that 251 is the accurate total of days paid. Claimant's brief appears to suggest that if an employer accounts for multiple days of paid vacation days or holidays on a single day's pay log or in a single pay check, that should count as only one day.

In reply, Employer concedes that the 235 figure for days worked is correct and that the parties had incorrectly double counted 24 May, but notes that correcting for both yields the same total of 263. Employer disagrees that Section 10(a) and *Wooley* may not be applied so to result in an annual earning calculation less than the actual wages earned by a claimant in the twelve months preceding his injury.

DISCUSSION

The narrow scope of the remand order simply requires findings as to whether days were created by dividing hours paid by eight or claimant received vacation or holiday pay for time that was not in lieu of a regular work day. The record clearly demonstrates that neither was the case.

Vacation or Holiday Not in Lieu of a Regular Work Day

Claimant specifically testified that he never sold back his vacation or holidays.[10] He testified that vacation days were allowed only during the regular work week.[11] He testified that he worked eight hours per day, five days per week, Monday through Friday.[12] He testified that the six holidays for Employer's employees were New Year's Day, Fourth of July, Easter Monday, Thanksgiving, Christmas, and Good Friday.[13] He testified that he was paid time and a half for Saturdays and double time for Sundays.[14] CX-1 shows that Claimant actually worked on some weekends.

[9] Thursday, 24 May.
[10] Tr. 27.
[11] Tr. 20.
[12] Tr. 17.
[13] Tr. 22-23.
[14] Tr. 18.

Obviously, Easter Monday, Thanksgiving, and Good Friday fall on weekdays. In the 12 month period prior to Claimant's 23 Jul 01 injury, New Year's Day fell on a Monday, the Fourth of July fell on a Wednesday, and Christmas fell on a Monday.[15] Moreover, Claimant was only allowed to take vacation during his regular work week. Consequently, the record clearly shows no vacation day or holiday counted as a paid day under *Wooley* was not in lieu of a regular work day.

Creating Days by Dividing Hours

The parties stipulated at hearing as to the numbers of days of work and holiday/vacation.[16] Claimant's counsel stated that "what we've done is we took CX-1 and counted all the days…"[17] "He also noted that in *Wooley*, "we didn't have these actual days worked and so consequently there's an extrapolation of the actual days worked. Here we have exactly what he worked." There is no indication that there was any dividing of hours in reaching those day counts. A review of CX-1 shows that vacation days (or partial vacation days of less than eight hours) were paid on Sunday and the Claimant did not work a full week preceding those Sundays. Because in some instances Claimant worked part of a day and took vacation for the remainder of the day, the question is whether the day should be counted as one or the other or fractionalized. If *Wooley* stands for the proposition that both vacation and work days are included in the divisor, the choice is moot, as the aggregation would be the same. In any event, the record is clear that in arriving at the number of days counted, the parties did not simply add hours and divide by eight.

Nonetheless, Claimant now seeks to withdraw from his agreement at trial that he had 29 holiday and vacation days. He does not specifically explain why that figure was in error. Claimant submitted a table that he argues summarizes the holidays and vacation days as reported in CX-1. It does in general match CX-1 and actually confirms that in entering into their stipulations the parties did not calculate the days by dividing total hours by eight. It concludes that Claimant only had 16 days, based in part on an argument that multiple vacation or holidays paid for on the same day should count as only one day. However, even rejecting that argument, Claimant's table yields a maximum of 24 days, which is significantly shy of the 29 to which he stipulated.

The parties agreed, and this litigation proceeded on the basis that there were 234 work days and 29 holiday/vacation days. Because of that agreement the record did not contain some of the evidence the parties might otherwise have offered (for instance a more complete explanation of CX-1 and what it means or more detailed testimony from

[15] Judicial notice.
[16] Tr. 41.
[17] Tr. 38.

Claimant). While ALJs are not required to accept a stipulation which is based on an incorrect application of the law,[18] parties are bound by the factual stipulations and agreements into which they enter.[19]

The Board remanded this case to determine if the parties' agreement on the day counts of 234 (worked) and 29 (holiday/vacation) was based on an incorrect application of the law. Specifically, the Board ordered a finding as to whether the agreement was based on dividing hours paid by eight, counting vacation or holiday days that were not in lieu of a regular work day. As the answer to both of those questions is no, it is clear that the parties' agreement to the actual counts of days was not based on a misapprehension of the law. The parties followed *Wooley* in their agreement on day counts, and in the absence of a determination that *Wooley* does not apply, should be bound by that agreement. This issue was litigated solely on Claimant's legal argument that *Wooley* is incorrect to the extent that it counts as part of the divisor any days other than those days on which the claimant actually performed work duties for Employer.[20] That is the issue the record was developed to present.

Application of *Wooley*

Given the agreement of the parties and the finding that their agreement was not based on dividing hours paid by eight or giving Claimant vacation or holiday days that were not in lieu of a regular work day, the number of paid days under *Wooley* as applied in this case remains 263.[21]

It is not clear if the Board's application of *Wooley* means any calculation resulting in a paid day total (in this case 263) in excess of the statutory daily wage multiplier (in this case 260 for Claimant as a five day worker) is unfair. If that is the appropriate reading of Section 10(a) and *Wooley*, there are two alternatives.

The first is to limit *Wooley* calculations of the total paid days to the statutory multiplier. In this case that would mean capping total days at 260, and essentially dividing Claimant earnings by 52 to reach his average weekly wage of $648.57.[22]

[18] *Puccetti v. Ceres Gulf*, 24 BRBS 25 (1990).
[19] *Littrel v.Oregon Shipbuilding Co.*, 17 BRBS 84 (1985).
[20] Such an argument appears to be essentially one for overruling or at least distinguishing *Wooley*, and Claimant's Counsel intimated as much at the hearing. Tr. 39.
[21] 24 May was originally double counted as both a work and vacation day, when it was actually half of each. Accepting Claimant's concession that the days worked should have been 235, the double counting acts to cancel the original understatement of days worked and leave the total days at 263.
[22] The steps of dividing and then immediately multiplying by 260 become moot.

The second would be to find that since the use of Section 10(a) and *Wooley* results in an annual wage less than that actually earned it is unfair, and the court must turn to Sections 10(b) or 10(c). If that were the case, in the absence of any Section 10(b) evidence I would use 10(c) and simply divide Claimant's annual actual earnings by 52 to reach an average weekly wage of $648.57.

However, the case law does not indicate that the paid days should be capped at the statutory multiplier or that where the application of *Wooley* results in a 3 day disadvantage to the claimant, Section 10(a) is unfair and does not apply. Employers could argue that they are equally disadvantaged in cases where a claimant worked the entire year prior to his injury, has a paid day count under *Wooley* less than 260, but a 260 multiplier is used nonetheless.

DECISION

Consequently, in accordance with *Wooley,* I find that Claimant was paid for 263 days of work, vacation and holidays. The figure of 263 is based on a count of calendar days and not dividing total hours. Claimant had no vacation days or holidays which were not in lieu of a regular work day. Claimant's average weekly wage was $641.15.

ORDER

1. Employer shall pay Claimant compensation for temporary total disability for the following periods: 13 Aug 01 - 18 Sep 01; 23 Sep 01 – 17 Feb 02; 4 Sep 02 – 9 Sep 02; and 15 Nov 02 – 21 Aug 03 based an average weekly wage of $641.15 at the time of injury.[23]

2. Employer shall receive credit for all compensation heretofore paid, as and when paid.

3. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982).[24]

4. The district director will perform all computations to determine specific amounts based on and consistent with the findings and order herein.

[23] 33 U.S.C. § 906(b)-(c)(2001)

[24] Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director. Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

5. Claimant's attorney shall have thirty days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty days from date of service to file any objections thereto.[25]

So ORDERED.

A

PATRICK M. ROSENOW
Administrative Law Judge

25 Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff.d, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after 10 May 04, the date this matter was referred from the District Director.